NO. 48999-6-II

In the Court of Appeals of the State of Washington
Division 2

STATE OF WASHINGTON, Respondent

v.

DEREK J. KINNEY, Appellant

APPELLANT'S REPLY BRIEF

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Must a "school bus route stop" be a "school bus stop" serviced by a "school bus" to support a sentencing enhancement under RCW 69.50.435 and 9.94A.533(6)?

B) ARGUMENT

A "school bus route stop" must be a "school bus stop" to support a sentencing enhancement under RCW 69.50.435 and 9.94A.533(6).

"[Q]uestions of statutory interpretation" are reviewed "de novo." *Ralph v. Dept. of Natl. Res.*, 182 Wn.2d 242, 248 (2014). The "fundamental objective in construing a statute is to ascertain and carry out legislative intent." *Id.* Appellate courts "cannot simply ignore express terms." *Id.* (internal quotation omitted). A statute must be interpreted "as a whole so that, if possible, no clause, sentence, or word shall be superfluous, void, or insignificant." *Id.*

"Any person who violates RCW 69.50.401 by...possessing with intent to...deliver a controlled substance...(c) Within one thousand feet of a school bus route stop designated by the school district" "shall" have "[a]n additional twenty-four months...added to the standard sentence range." RCW 69.50.435(1), 9.94A.533(6). "'School bus route stop' means a school bus stop as designated by a school district." RCW 69.50.435(6)(c). A plain reading of the statute requires not only that the location be "designated by

a school district," but also that the location actually be a "school bus stop." To read otherwise, as the State proposes, would treat the phrase "school bus stop" as superfluous.

Under the State's treatment of the statutory phrase "school bus stop" as a stand-in for "location," a school district may designate any location as a "school bus route stop" even if that location was only used by common carrier buses; was only used formerly or irregularly by school buses; was used only by 4-passenger school district-owned sedans for transporting students; or even was never used by any bus, student or child at all.

The State misreads *State v. Davis* as supporting its position. *Davis* was concerned with a due process challenge, not an issue of statutory construction. 93 Wn. App. 648, 652-53 (1999). The *Davis* court rejected the argument that the "sentence enhancement under RCW 69.50.435 violated due process" "because there was no fair way to know that [a] public transit stop [was] also a school bus stop." *Id.* at 652. The *Davis* court did not examine whether the location *was* a "school bus stop."

Moreover, although the statutory definition of "school bus" does exclude "buses operated by common carriers in the urban transportation of students," it explicitly includes "school buses which are privately owned and operated under contract or otherwise with any school district in the

state for the transportation of students." RCW 69.50.435(6)(b). The *Davis* opinion indicated the "Bremerton School District contracted with Kitsap Transit to supply school transportation on its regular public buses, which do not look like typical yellow school buses." 93 Wn. App. at 652. The opinion is *silent*, however, on whether those buses regularly used to transport students were "common carrier" buses at the time they were transporting students.

Furthermore, the legislature designated specific classes of locations as drug-free zones. RCW 69.50.435(1). The legislature failed to include an "all areas that are frequented by children" catch-all. *See id.* Indeed, the legislature had an opportunity to amend the statute to include "preschool" as such a location, but did not do so. *See* H.B. 2148, An Act Relating to the Sale of Controlled Substances on or near a Preschool Facility, 52nd Leg., Reg. Sess. (Wash. 1991).

Moreover, although the primary purpose of the statute is to "keep drug dealers away from school children," the particulars of how the statute operates cannot be ignored to effectuate this purpose. *See State v. Coria*, 120 Wn.2d 156, 175 (1992). Indeed, legislature did specify numerous locations that have only a tenuous or conditional connection to students or children, such as "a public housing project," "a public transit stop shelter," and a "civic center." RCW 69.50.435(1)(f), (h), and (i). And the

legislature clarified the locations are subject to the enhancement, regardless of whether "persons under the age of eighteen were...present." RCW 69.50.435(3). In other words, the purpose of the statute cannot trump the statute's plain meaning. The "statute's classificatory scheme" even if it is a "blunt" "instrument" in "furthering its end," must be followed, even if a particular application of the statute may seem counter-intuitive or at odds with the statute's underlying purpose. *See Coria*, 120 Wn.2d at 173.

C) CONCLUSION

The legislature has enumerated ten classes of locations as subject to the drug-free zone sentencing enhancement. The class of location at issue in this case—the "school bus route stop"—must by plain meaning only apply to "school bus stop[s]," not any location designated as a "school bus route stop" by a school district. Because a "school bus stop" must be serviced by a "school bus," and because a vehicle that transports only preschool children does not meet the statutory and regulatory definition of "school bus," there was insufficient evidence for the jury to have concluded Mr. Kinney possessed a controlled substance within 1000

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feet of a school bus route stop with the intent to deliver. Therefore, this Court should reverse the sentencing enhancement.

DATED this 17th day of January, 2017.

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I hereby certify that a true copy of the foregoing APPELLANT'S REPLY BRIEF was delivered by electronic mail to counsels for the Respondent, Mark McClain at mmcclain@co.pacific.wa.us and Donald J. Richter at drichter@co.pacific.wa.us, and mailed, postage prepaid, to the Appellant, Derek Kinney, c/o Washington State Penitentiary, 1313 N 13th Ave, Walla Walla, WA 99362.

/s/ Christopher Taylor
Christopher Taylor

CR TAYLOR LAW, P.S.

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